

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

24 July 2023

In re Application of)
)
 FORT MYERS BROADCASTING COMPANY)
 For FM Translator License) FCC File No. 0000120834
 Call Sign W239CL, Golden Gate, FL) Facility ID 139116

To: Marlene H. Dortch, Secretary
Federal Communications Commission
Attn: Media Bureau, Audio Division

APPLICATION FOR REVIEW

I. INTRODUCTION

Sumarrase, Inc. (“Sumarrase”) files this Application for Review (“Appeal”) of the Audio Division, Media Bureau (“Bureau”) dismissal (“Dismissal”), on June 23, 2023, of its Petition for Reconsideration (“Petition”) in the above-referenced matter.¹ Sumarrase, Inc. has standing as both a participant in the underlying proceedings and as a party aggrieved by the Letter Ruling (“Decision”), DA 23-542, dismissing its Petition. This Appeal is timely filed pursuant to 47 C.F.R. Section 1.115(d).²

¹ The Petition is pleading no. 0000124025. Relevant responsive pleadings are found in pleading file nos. 0000124701 (“Opposition”) and 0000125099 (“Reply”).

² See Commission’s Daily Digest, Vol. 42, No. 120, June 23, 2023.

On February 28, 2020, Fort Myers Broadcasting Company (FMBC), the licensee of FM Translator Station W239CL, filed an application for a minor modification to change the W239CL licensed transmitter site and modify its facilities.³ The Bureau granted this application on March 13, 2020. On August 27, 2020, FMBC filed the subject license application (“License Application”) to cover the modified W239CL permit which was granted on September 25, 2020. Sumarrase filed the Petition on October 6, 2020, requesting reconsideration.

This Appeal arises from prejudicial procedural error, an erroneous finding of fact, and because the Bureau has treated the similarly situated opposing parties unequally. As such, it meets the requirements of an application for review taken pursuant to delegated authority.⁴

II. PREJUDICIAL PROCEDURAL ERROR

The Bureau committed prejudicial procedural error when it dismissed the Petition as procedurally defective. Sumarrase filed an actionable claim of interference as a Petition for Reconsideration because listener complaints were received after modified W239CL entered service on August 27, 2020.⁵ In its dismissal, the Bureau concluded that

“During the six-month period from the February 2020, filing of the W239CL modification application to the subsequent, August 2020, submission of the License Application, Sumarrase could have presented information regarding the predicted interference, but neglected to do so. We find that Sumarrase was not a party to the proceeding and has not justified its failure to participate earlier.”⁶

3 *See* Application File No. 0000106772 (“underlying construction permit”).

4 *See* 47 C.F.R. Section 1.115.

5 Petition at 1, citing 47 C.F.R. Section 74.1203.

6 Decision, at 4.

It is axiomatic that claims of actual interference that rely on listener complaints cannot be presented until listener complaints are received. As explained in the responsive pleading cycle, the initial listener complaints that Sumarrase believed to be valid were not received until September 11, 2020.⁷ Since this date falls after August 27, 2020, it is unreasonable that complaints covered by 47 C.F.R. Section 74.1203(a)(3) could be tendered in time to make Sumarrase a party to the proceeding any earlier.

Although the Petition, Opposition, and Reply each refer to Section 74.1203, the Bureau dismissed the Petition with ignorance of 74.1203, instead referencing inapposite Section 74.1204 pertaining to “predicted interference.”⁸ Yet, the Commission has clearly intended to allow interference complaints based on actual interference that has not previously been predicted. The Commission previously declined to impose a time limit on such interference claims after a translator commences operation.⁹ The Petition presented complaints of actual interference that were received and analyzed before the W239CL grant was final. Because a translator that “will not be permitted to operate” essentially cannot be licensed, Sumarrase believes that it has been unfairly deprived of its right to Petition. The injury-in-fact requirement to seek review of the license grant has been met.

There is another problem with the Bureau's dismissal finding of a lack of standing. It is not ordinary diligence to interview every person that may regularly pass within certain contour boundaries to determine if they are a regular listener and, if so, to perform an engineering

7 Reply, at 2.

8 See Petition, at 1, 3; Opposition, at 2; Reply, at 2; Decision, at 4 and n.22.

9 See Amendment of Part 74 of the Rules Regarding FM Translator Interference, Report and Order, 34 FCC Rcd 3457 (2019) (“Translator Interference Order”), at para. 25.

analysis.¹⁰ Section 1.106(b)(2)(ii), via Section 1.106(c)(1), suggests that a petition for reconsideration will be entertained when relying on newly discovered facts that could not be learned through the exercise of ordinary diligence.

The Bureau's error continued when it failed to recognize the injury-in-fact of existing W239CL interference to WSGD-LP that has yet to be resolved. Sumarrase had pointed out that FMBC had previously sought and been granted a (never constructed) non-adjacent channel change pursuant to the FM translator interference Report And Order to mitigate interference to WSGD-LP.¹¹ The ball was already in FMBC's court to resolve interference caused by W239CL.

As contemplated in the Translator Interference Order, a translator operator may work with a complaining station to resolve station signal interference issues.¹² The minor modification to move to the current facility was exactly that playing out, and it is a travesty if working outside of a formal process, lessening the burden on the Bureau would prejudice a party. If FMBC believed that a modification would resolve interference, then why wouldn't Sumarrase let them try? Sumarrase continues to believe that it has standing as an injured party until the admitted interference is actually resolved.¹³

Finally, the Bureau committed prejudicial procedural error when it failed to consider the merits of an argument that the constructed W239CL antenna pattern was never accurately disclosed in an application. During the Petition's pleading cycle, new information regarding the

10 *See* 47 C.F.R. Section 74.1203(a)(3).

11 Reply, at 6.

12 Translator Interference Order, at para. 9.

13 Resolution is determined by a declaration or the final grant of a replacement FM translator facility license.

antenna and its antenna pattern was revealed by the applicant.¹⁴ This left the Reply as the earliest opportunity to present facts regarding candor and regarding deficiencies of both the license application and that of the underlying construction permit, and the issue was raised.¹⁵ The Bureau gave no consideration to this argument.

III. ERRONEOUS FINDING TO AN IMPORTANT MATERIAL QUESTION

The Bureau admits that Sumarrase may file an application for a minor modification of its station license to correct its violation.¹⁶ In doing so, WSGD-LP would operate with the same location, elevation, channel, and ERP with no changes to the transmission system. Since there would be no material change impacting the interference complaint, there is no material justification to deny the station protection with the parameters with which it had been operating when listeners started complaining. Thus, Sumarrase postulates that the Bureau erred when it failed to act on the interference package that was submitted because of a finding that WSGD-LP's signal was unauthorized. Because the station was conformed to the underlying construction permit, believes that the station should have been considered as authorized for the purposes of the submitted interference complaint.

While Sumarrase does not contest that it erred when it submitted its license application to include incorrect information about the transmission system, and it accepts a penalty that has been imposed, it does beg review that a circumstance relating to documentation with no material

14 Opposition, at Exhibit I, Figure 1.

15 Reply, at 6.

16 Decision, at 6.

impact from a valid authorization should be taken out on listeners that can no longer listen to WSGD-LP's unique programming.¹⁷

IV. UNEQUAL TREATMENT OF SIMILARLY SITUATED PARTIES

The Bureau reached a conclusion “that Sumarrase has operated WSGD-LP with an unauthorized two-bay antenna, instead of the single-bay antenna specified on the WSGD-LP license.”¹⁸ Ironically, as discussed above, FMBC constructed with a fundamentally different pattern than it disclosed. A station operating with the same predicted contour as its construction permit and license is found to be unauthorized, yet no equivalent finding was made about a station that constructed at a substantial variance to what it put in its applications.

The Bureau's decision requires Sumarrase to come into compliance to sort out its authorization. An equal treatment would require that FMBC also sort out its compliance to disclose an accurate directional pattern, and that starts with not granting the license reflected in the application. FMBC can file a minor modification application to properly document an accurate directional pattern allowing correct information to populate the database that affects protections going forward.

V. REMEDIATION

Sumarrase requests the Commission find that the Petition was not procedurally defective, find that Sumarrase has standing as an aggrieved party, overturn the dismissal of the Petition, and dispose of all the arguments that were raised, including those on which the Bureau has

¹⁷ Translator Interference Order, at para. 48 finding that “the damage is done in fairly short order after the translator signs on—those existing listeners displaced by the translator interference often tune elsewhere and may not ever return.”

¹⁸ Decision, at 5.

passed.¹⁹ Sumarrase requests that the Commission overturn the Bureau's finding that WSGD-LP has not been operating pursuant to a valid authorization for the purposes of receiving interference. The Commission should rescind the license grant on the basis that FMBC has not constructed its translator according to the specifications of its permit application, and it should direct any modified facility to resolve interference to WSGD-LP.

Respectfully Submitted,

Dwayne Williams

Dwayne Williams
President; *Sumarrase, Inc.*
3507 Lee Blvd., Suite 254
Lehigh Acres, FL 33971

¹⁹ The Commission should also take note of the 990 days that passed between the filing of the Petition for Reconsideration and the release of a decision letter and strive to dispose of the pleading within the required 90 days. 47 C.F.R. Section 1.106(j) and 47 U.S.C. Section 405(a).

Certificate of Service

I, Dwayne Williams, certify that a true and correct copy of the foregoing Reply to Opposition was sent, this 24th day of July, 2023, by first-class, postage paid mail to the following:

Fort Myers Broadcasting Company (Licensee)
Jennifer A. Johnson, Esq.
Covington & Burling LLP
One City Center
850 10th St NW
Washington, DC 20001-4956

By: *Dwayne Williams*

Dwayne Williams